

1993

State of Utah v. Ronald L. Boren : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 930275-CA
v. :
RONALD L. BOREN, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

- - - - -
APPEAL FROM A CONVICTION OF THEFT, A THIRD
DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.
§ 76-6-404 (1990), IN THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE RONALD O. HYDE,
PRESIDING.

UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 930275

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FILED
Utah Court of Appeals

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Clerk of the Court

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, : Case No. 930275-CA
v. :
RONALD L. BOREN, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE
- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of theft, a third degree felony, in violation of Utah Code Ann. § 76-6-404 (1990).

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Did the trial court properly instruct the jury on the elements of theft?

"Determining the propriety of the instructions submitted to the jury presents a question of law, and we therefore review the trial court's instructions under a correction of error standard." Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993). Additionally, this Court "review[s] jury instructions in their entirety and will affirm when the jury instructions taken as a whole fairly instruct the jury on the law applicable to the case." State v. Ontiveros, 835 P.2d 201, 205 (Utah App. 1992).

2. Where the trial court properly instructed the jury on the intent for theft and the State's burden of proof, did those instructions create a constitutionally impermissible mandatory rebuttable presumption?

This issue is governed by the same standard of review as Issue 1.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statutory provisions are at issue in this appeal (attached as Addendum A).

Utah Code Ann. § 76-4-404 (1990):

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

Utah Code Ann. § 76-6-401(3) (1990):

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

STATEMENT OF THE CASE

The State charged defendant with theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404 (1990) (R. 7-8).

Defendant filed a Motion in Limine requesting that the judge not instruct the jury on the statutory elements of theft

listed in Section 76-6-401(3)(b) (R. 115-120). The trial court denied this motion (R. 383-85).

A jury found defendant guilty as charged (R. 212). Defendant filed a motion for a new trial based on the trial court's denial of his motion in limine and the trial court's refusal to give a requested instruction adding the word "permanently" to the elements of theft (R. 225-26). The trial court denied the motion for a new trial (R. 361).

The trial court, pursuant to Utah Code Ann. § 76-3-402 (Supp. 1992), reduced defendant's conviction one degree and sentenced defendant to zero to five years in the Utah State Prison and to pay restitution in the amount of \$150.00 (R. 265). The court stayed the sentence and placed defendant on thirty-six months probation (R. 265).

STATEMENT OF THE FACTS

Jeb Clark, the victim in this case, purchased a car for 99 cents (Tr. Feb. 9, 1993, "Tr.1" at 58) (R. 377, 379) (Exhibit 1). The vehicle was operable after some initial repairs (Tr.1 at 58). The ignition operated with a screwdriver or knife, and no key was needed to start the car (Tr.1 at 59, 63, 112) (Exhibit 3).

Defendant's brother, assisted by defendant, repaired the car's brakes (Tr.1 at 68) (R. 366). Defendant's brother frequently drove the car and had repaired the car in the past (Tr.1 at 79, 93, 95). Mr. Clark was unaware that defendant had worked on the car and never discussed the brake job with

defendant (Tr.1 at 69, 76, 92). However, Mr. Clark subsequently learned that defendant expected to be paid for the work (Tr.1 at 71).

On April 18, 1992, Mr. Clark lent the car to Lyla Shore (Tr.1 at 64, 105). A witness saw defendant drive the car out of Ms. Shore's driveway (Tr.1 at 83-84). Neither Mr. Clark nor Ms. Shore gave defendant permission to drive the car (Tr.1 at 65, 111).

Defendant told his son and his brother that he would return the car to Mr. Clark if he received compensation for his work on the brakes (Tr.1 at 87-89) (R. 366-67).

The next morning, Mr. Clark, Ms. Shore and Bryan Shore drove to defendant's ex-wife's house and saw the car parked in front of her house (Tr.1 at 108, 114, 120). The license plates on the car had been changed (Tr.1 at 65, 125-126).

Defendant saw this group, ran from the house, threw the ignition switch into the field behind his house and hid behind a fence (Tr.1 at 109, 110, 120). Mr. Clark heard defendant shout that the "next time he got ahold of the car, it would be in the Jordan River" (Tr.1 at 74, 78). The police arrived and arrested defendant for theft of the car (Tr.1 at 111).

SUMMARY OF THE ARGUMENT

The trial court correctly instructed the jury on the elements of theft. Defendant's requested instruction misstated the law by ignoring two of three alternate statutory definitions of "purpose to deprive" in the theft statute. The court

correctly instructed the jury on the requisite intent for theft. The court's instructions properly followed the statutory language, which does not create an impermissible "mandatory presumption." This Court should affirm defendant's conviction.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE ELEMENTS OF THEFT

Defendant claims the trial court erroneously failed to include the word "permanently" when it instructed the jury on the elements of theft. Br. of App. at 5-12. However, such an instruction would be a misstatement of the law. The trial court properly instructed the jury on the law of theft.

A. Standard of Review for Jury Instructions

"Determining the propriety of the instructions submitted to the jury presents a question of law, and we therefore review the trial court's instructions under a correction of error standard." Ames v. Maas, 846 P.2d 468, 471 (Utah App. 1993). Additionally, this Court "review[s] jury instructions in their entirety and will affirm when the jury instructions taken as a whole fairly instruct the jury on the law applicable to the case." State v. Ontiveros, 835 P.2d 201, 205 (Utah App. 1992). Furthermore, "the trial court is not required to give any requested jury instruction if it does not . . . accurately state the applicable law." State v. James, 819 P.2d 781, 799 (Utah 1991).

B. Jury Instructions in this Case

Jury Instruction 9 tracked Utah Code Ann. § 76-4-404 (1990) verbatim. The instruction read, "Under the law of the State of Utah, a person is guilty of theft if that person obtains or exercises unauthorized control over the property of another with a purpose to deprive the owner thereof." (R. 193) (Instructions 8, 9, 10 are Attached as Addendum B). Section 76-4-404 states: "A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." (Addendum A).

Furthermore, the trial court correctly instructed the jury on the alternate statutory definitions of "purpose to deprive" set forth in Section 76-6-401(3):

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; ^[1] or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

¹Defendant's object seems to have been to deprive the jury of the option of relying on this subsection, which defendant was forced to admit covered the facts of this case. Defendant's opening statement included this statement: "Now, the evidence is going to show that Mr. Boren, when Mr. Clark failed to pay him, Mr. Boren took the car and said, 'You can have it back, just give me my \$25 for the work I've done on your car.'" (Tr. Feb. 9, 1993 at 52).

(emphasis added) (Addendum A). Jury Instruction 10 sets forth this language verbatim (R. 194) (Addendum B).

As the Utah Supreme Court stated in State v. Asay, 631 P.2d 861, 863 (Utah 1981) "[t]he wording of the given instructions recited the statutory elements of the offense of theft nearly verbatim. Hence, no error is contained therein."

**C. Defendant's Proposed Instructions
Misstated the Law**

Defendant complains that the term "permanently" in Instruction 10 "modifies only one of the three alternative definitions" and that "the jury was allowed to consider either one of the two other alternatives, both of which were not modified by the adverb, 'permanently.'" Br. of App. at 9-10. However, the legislature chose to include three alternative definitions of the intent necessary for a "purpose to deprive." Defendant's requested addition of the word "permanently" restricts the crime of theft to only one of three statutory definitions and is therefore, a misstatement of the law. As the supreme court held in James, "the trial court is not required to give any requested jury instruction if it does not . . . accurately state the applicable law." 819 P.2d at 799.

**D. The Jury Considered Defendant's Theory of
the Case**

Additionally, the trial court adequately instructed the jury on defendant's theory of the case. Utah Code Ann. § 76-1-402(4) (1990) (court obligated to give lesser included instruction if "there is a rational basis for a verdict

acquitting the defendant of the offense charged and convicting of the included offense"). Defendant asserted that he merely temporarily deprived the victim of the car and that he did not have the required intent for theft (R. 115-129, 384-85). However, the jury considered and rejected defendant's theory by following the jury instructions and convicting defendant of theft (R. 197-199, 212-215). The trial court properly instructed the jury on defendant's theory of the case by giving instructions on the lesser included offenses of the temporary deprivation of a motor vehicle in violation of Section 41-1a-1311(1) and joyriding in violation of Section 41-1a-1314(1) (R. 197-199). The jury rejected these lesser included charges and found beyond a reasonable doubt that defendant committed theft.²

POINT II

THE INSTRUCTIONS DID NOT RELIEVE THE STATE OF
ITS BURDEN TO PROVE INTENT BEYOND A
REASONABLE DOUBT

Defendant asserts that Instruction 10 unconstitutionally relieved the State of its burden to prove every element of the offense beyond a reasonable doubt by creating a mandatory rebuttable presumption. Br. of App. at 12-15. A jury instruction creates an unconstitutional mandatory

²Defendant's reliance on State v. Chesnut, 621 P.2d 1228, 1232 (Utah 1980), disapproved on other grounds State v. Crick, 675 P.2d 527, 531 (Utah 1983), in support of his claim of error is misplaced. Br. of App. at 5-12. The supreme court overturned Chesnut's conviction because the trial court failed to instruct the jury on lesser included offenses. Id. at 1232. Here, the trial court properly instructed the jury on all requested lesser included offenses.

presumption where the language instructs the jury that it can "infer" an element of the crime or that certain evidence creates a "prima facie" presumption of guilt. See Sandstrom v. Montana, 442 U.S. 510, 515 (1979) (jury impermissibly instructed that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.") (emphasis added); Francis v. Franklin, 471 U.S. 307, 316 (1985) (improper instruction that "acts of a person of sound mind and discretion are presumed to be the product of the person's will," and that a person "is presumed to intend the natural and probable consequences of his acts.")). However, none of the instructions in this case contained this impermissible language (R. 188-211).³

Contrary to defendant's assertion, the instructions do not provide that the State need only prove certain predicate

³Defendant's reliance on two Utah cases in support of this position is likewise misplaced. He cites State v. Chambers, 709 P.2d 321 (Utah 1985) and State v. Johnson, 745 P.2d 452 (Utah 1987) for the proposition that a jury instruction that tracks statutory language verbatim creates this type of impermissible presumption. Br. of App. at 14-15. However, in both cases, the language of the statute, and the instruction, contained the impermissible language. Compare Chambers, 709 P.2d at 324 ("[p]ossession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property.") (emphasis added), and Johnson, 745 P.2d at 456 ("possession of property recently stolen, when a person in possession fails to make a satisfactory explanation of such possession, is a fact from which you may infer that the person in possession stole such property.") (emphasis added), with, Utah Code Ann. § 76-6-402(1) (1978), "[p]ossession of property recently stolen, when no satisfactory explanation of such possession is made, shall be deemed prima facie evidence that the person in possession stole the property." This type of impermissible language is not found in the trial court's jury instructions (R. 188-211).

facts in order for the jury to presume intent. Rather, they clearly instructed the jury that the State bore the burden of proving beyond a reasonable doubt that defendant had the conscious object to deprive another of his property.

Instruction 8 stated:

You are instructed that in every crime or public offense, there must be a union or joint operation of the act and intent. A person is only guilty of an offense when his conduct is prohibited by law and he acts with some kind of criminal intent that is, he acts intentionally or knowingly as the definition of an offense requires. As used in these instructions, a person engages in conduct "intentionally" or with intent, when it is his conscious objective or desire to engage in conduct or cause the result. As used in these instructions, a persons engages in conduct "knowingly" or with knowledge, when he is aware that his conduct is reasonably certain to cause the result.

(R. 192) (emphasis added). This instruction along with Instructions 9 and 10 forced the jury to focus on the definition of intent. When read in conjunction with Instructions 3, 5, and 7 (attached as Addendum C), which emphasize the proper standard of proof, the jury understood that the State had to prove beyond a reasonable doubt that defendant had to have a "conscious objective" to meet the element of "purpose to deprive" in the crime of theft (R. 192, 194) (Addendum B) see Point I, Part B supra. The trial court never instructed the jury that it could infer or presume the requisite intent, or any other element of the crime, from any particular evidence.

The instructions as a whole informed the jury of the intent required for theft. Defendant fails to demonstrate how

these instructions created an impermissible mandatory presumption. The jury properly based its guilty verdict on the evidence in accordance with these instructions.

CONCLUSION

The trial court properly instructed the jury on the elements of the crime of theft and the requisite intent. Accordingly, this Court should affirm defendant's theft conviction.

RESPECTFULLY SUBMITTED this 18th day of November, 1993.

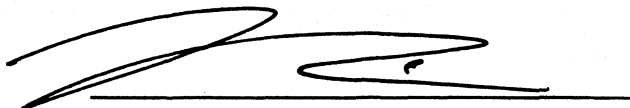
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CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Appellee were mailed by first class mail to RONALD S. FUJINO and ROGER SCOWCROFT, SALT LAKE LEGAL DEFENDER ASSOC., attorneys for appellant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, this 18th day of November, 1993.



ADDENDA

ADDENDUM A

76-6-404. Theft — Elements.

A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.

History: C. 1953, 76-6-404, enacted by L. 1973, ch. 196, § 76-6-404.

Cross-References. — Motor vehicles, special anti-theft laws, §§ 41-1-105 to 14-1-121. Shoplifting Act, § 78-11-14 et seq.

PART 4

THEFT

76-6-401. Definitions.

For the purposes of this part:

(1) "Property" means anything of value, including real estate, tangible and intangible personal property, captured or domestic animals and birds, written instruments or other writings representing or embodying rights concerning real or personal property, labor, services, or otherwise containing anything of value to the owner, commodities of a public utility nature such as telecommunications, gas, electricity, steam, or water, and trade secrets, meaning the whole or any portion of any scientific or technical information, design, process, procedure, formula or invention which the owner thereof intends to be available only to persons selected by him.

(2) "Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtainer or another; in relation to labor or services, to secure performance thereof; and in relation to a trade secret, to make any facsimile, replica, photograph, or other reproduction.

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

(4) "Obtain or exercise unauthorized control" means, but is not necessarily limited to, conduct heretofore defined or known as common-law larceny by trespassory taking, larceny by conversion, larceny by bailee, and embezzlement.

(5) "Deception" occurs when a person intentionally:

(a) Creates or confirms by words or conduct an impression of law or fact that is false and that the actor does not believe to be true and that is likely to affect the judgment of another in the transaction; or

(b) Fails to correct a false impression of law or fact that the actor previously created or confirmed by words or conduct that is likely to affect the judgment of another and that the actor does not now believe to be true; or

(c) Prevents another from acquiring information likely to affect his judgment in the transaction; or

(d) Sells or otherwise transfers or encumbers property without disclosing a lien, security interest, adverse claim, or other legal impediment to the enjoyment of the property, whether the lien, security interest, claim, or impediment is or is not valid or is or is not a matter of official record; or

(e) Promises performance that is likely to affect the judgment of another in the transaction, which performance the actor does not intend to perform or knows will not be performed; provided, however, that failure to perform the promise in issue without other evidence of intent or knowledge is not sufficient proof that the actor did not intend to perform or knew the promise would not be performed.

ADDENDUM B

INSTRUCTION NO. 8

You are instructed that in every crime or public offense,
there must be a union or joint operation of the act and intent.

A person is only guilty of an offense when his conduct is prohibited by law and he acts with some kind of criminal intent that is, he acts intentionally or knowingly as the definition of an offense requires.

As used in these instructions, a person engages in conduct "intentionally" or with intent, when it is his conscious objective or desire to engage in conduct or cause the result.

As used in these instructions, a person engages in conduct "knowingly" or with knowledge, when he is aware that his conduct is reasonably certain to cause the result.

INSTRUCTION NO. 9

Under the law of the State of Utah, a person is guilty of theft if that person obtains or exercises unauthorized control over the property of another with a purpose to deprive the owner thereof.

INSTRUCTION NO. 16

"Property" means anything of value, including tangible personal property.

"Obtain" means, in relation to property, to bring about a transfer of possession or of some other legally recognized interest in property, whether to the obtained or another.

"Purpose to deprive" means to have the conscious objective ^{a/}to withhold property permanently or for so extended a period or to use under circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost, ^{b/}or to restore the property only upon payment of a reward or other compensation, ~~or~~ ^{c/}to dispose of the property under circumstances that make it unlikely that the owner will recover it.

An "operable motor vehicle" is a motor vehicle capable of being driven.

"On or about" includes any day that closely approximates or is near the day alleged in the Information.

ADDENDUM C

INSTRUCTION NO. 2

Instruction No. 1 is not to be considered by you as a statement of the facts proved in this case, but is to be regarded by you merely as a summarized statement of the allegations of the Information. The mere fact that the defendant stands charged with an offense is not to be taken by you as any evidence of his guilt.

INSTRUCTION NO. 3

You are instructed that to the Information the defendant has entered a plea of not guilty. The plea of not guilty denies each and all of the essential allegations of the charge contained in the Information and casts upon the State the burden of proving each and all of the essential allegations thereof to your satisfaction and beyond a reasonable doubt.

INSTRUCTION NO. 4

You are instructed that the mere fact that the defendant has been charged with this offense and has been held to answer to the charge by a committing magistrate, is not any evidence of his guilt and is not even a circumstance which should be considered by you in determining his guilt or innocence.

INSTRUCTION NO. 5

It becomes my duty as judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

The function of the jury is to try the issues of fact that are presented by the allegations in the Information filed in this court and the defendant's plea of "not guilty". This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice against him. You must not suffer yourselves to be biased against the defendant because of the fact that he has been arrested for this offense, or because an Information has been filed against him, or because he has been brought before the court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the State of Utah and the defendant have a right to demand and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, that you will reach a just verdict regardless of what the consequences of such verdict may be. The verdict must express the individual opinion of each juror.

INSTRUCTION NO. 7

All presumptions of law, independent of evidence, are in favor of innocence, and a defendant is presumed innocent until he is proved guilty beyond a reasonable doubt. And in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to an acquittal.

I have heretofore told you that the burden is upon the State to prove the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not require proof to an absolute certainty. Now by reasonable doubt is meant a doubt that is based on reason and one which is reasonable in view of all the evidence. It must be a reasonable doubt and not a doubt which is merely fanciful or imaginary or based on a wholly speculative possibility. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it and obviates all reasonable doubt. A reasonable doubt is a doubt which reasonable men and women would entertain, and it must arise from the evidence or the lack of the evidence in this case.